(2)

No. 00-394

Supreme Court, U.S.
FILED

OCT 13 2000

CLERK

IN THE

Supreme Court of the United States

MARY TERESE CAMPBELL,

Petitioner,

—v.—

CANTOR FITZGERALD & CO., INC., CANTOR FITZGERALD SECURITIES CORP., CANTOR FITZGERALD L.P., a Limited Partnership, HOWARD LUTNICK, and HARRY NEEDLEMAN, jointly and severally,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Michael A. Lampert
Counsel of Record
SAUL EWING LLP
A Delaware LLP
214 Carnegie Center, Suite 202
Princeton, New Jersey 08540
(609) 452-3100

Counsel for Respondents

Of Counsel:

Michele A. Daitz

32pp

TABLE OF CONTENTS

	Page
Table of Authorities	iii
Statement of the Case	1
Summary of the Argument	9
Argument	11
Point I: Campbell's Failure To Include In Her Notice Of Appeal The Underlying Judgments Of The District Court Does Not Entitle Her To A Writ Of Certiorari Nor Can It Form The Basis Of Error By The Court Of Appeals	11
A. The Underlying Judgments Were Not Included In The Notice Of Appeal And So Review On Appeal Was Correctly Restricted To The District Court's Reconsideration Order	12
B. Campbell's Failure To Move Before The District Court To Amend Her Notice Of Appeal Similarly Precludes The Court Of Appeals From Reviewing The Underlying Judgments	15

Point II: Campbell's Failure To Proffer The NASD Transcripts To The District Court Does Not Entitle Her To A Writ Of Certiorari Under Rule 10 And Cannot Be The Basis For Any Error By the Court of Appeals 18

Conclusion 26

Appendix APP 1

TABLE OF AUTHORITIES

Cases **Page**

Commonwealth Associates v. Lestos,
40 F. Supp.2d 170 (S.D.N.Y 1999) 20

Kowsh v. Board of Elections of the City of
New York, 99 F.3d 78, 80 (2d Cir. 1996) 14, 16

Malek v. Federal Insurance Co.,
994 F.2d 49 (2d Cir. 1993) 21

Murphy v. American Home Products Corporation,
58 N.Y.2d 293, 461 N.Y.S.2d 232 (N.Y. 1983) 23

Terkildsen v. Waters,
481 F.2d 201, 206 (2d Cir. 1973) 14

United States v. Curcio,
759 F.2d 237 (2d Cir. 1985) 21

Weider v. Skala,
80 N.Y.2d 628, 593 N.Y.S.2d 752 (N.Y. 1992) 23

STATEMENT OF THE CASE

Petitioner, Mary Therese Campbell ("Campbell"), worked at Cantor Fitzgerald ("Cantor") in its New York office as an institutional salesperson from October 19, 1987 to March 25, 1992 when she was discharged. Three years later, on March 25, 1995, Campbell started an arbitration at the National Association of Securities Dealers ("NASD"). Campbell seemed to contend that she was wrongfully terminated in retaliation for her husband's participation or assistance in a Securities and Exchange Commission investigation of Cantor. She also claimed that Cantor defamed her by filing a U-5 form which indicated that she had been terminated for failure to follow firm practices. (App. 2d)

The NASD hearings spanned five months, involved 30 hearing sessions and generated 2,200 pages of transcript testimony. On March 5, 1998, the NASD arbitration panel issued its award. The panel granted Cantor's motion to dismiss Campbell's wrongful termination claim, finding that she was an at-will employee who could be terminated for any reason or no reason. The panel also found that Campbell failed to sustain her burden of proof as to the defamation claim, that some claims were untimely, and assessed forum fees against her pursuant to NASD Rule 10205(c). (App. 4d-5d)

Campbell then petitioned the United States District Court for the Southern District of New York to vacate the arbitration award, and thereafter filed an amended petition on June 17, 1998 (98 Civ. 3973). (App. 1d) Campbell contended that the award should be vacated because the

award was: (1) in manifest disregard of the law; (2) arbitrary and capricious; (3) affected with partiality through the disregard of evidence and controlling law; (4) in excess of the panel's power; and (5) in violation of public policy. (App. 7d) Campbell essentially argued that because of the overwhelming evidence she presented to the NASD, she should have won. Campbell did not submit the NASD transcripts with her petition or amended petition. (App. 7d)

While that petition was pending, on June 26, 1998, Campbell filed a separate lawsuit against Cantor in the Southern District of New York alleging defamation, intentional infliction of emotional distress, injurious falsehood and making false statements to injure her based on the New York Attorney General's posting on his website a copy of the U-5 (98 Civ. 4547). (App. 14d) The claims were based upon the same facts as Campbell's arbitration claims. Campbell did not submit the NASD transcripts as part of the record of this separate lawsuit.

On June 19, 1998, the District Court held a conference with the parties. It directed Campbell to submit all of the materials that she wanted to include in the record to the Court by July 13, 1998. Campbell neither submitted the NASD transcripts to the Court pursuant to the Court's directive, nor sought an extension of time within which to do so. (App. 2c-3c)

In a memorandum decision dated September 24, 1998, the District Court denied Campbell's petition to vacate the arbitration award. The Court found that she was attempting to re-try her entire case, urging the Court to reconsider the panel's determination as to the weight and

credibility of the evidence. The Court specifically determined that Campbell had failed to demonstrate any manifest disregard of the law because she never identified any principle of law which the panel purportedly failed to follow. The Court further found that Campbell provided no proof of partiality or misconduct by the panel, nor did she provide any evidence that her due process rights had been violated since the arbitration was conducted in accordance with NASD arbitration procedures. The Court also affirmed the assessment of forum fees, finding that Campbell had not involuntarily submitted the dispute to arbitration, raised no objection to the proceeding and otherwise offered no evidence that she was involuntarily forced to proceed with the arbitration. (App. 1d) The Court then dismissed with prejudice her separate defamation lawsuit finding that, because it was based on exactly the same underlying facts as the arbitration claims, the claims were barred by the doctrine of res judicata. (App. 1d) Two judgments were then issued by the Court, one dated September 29, 1998 confirming the arbitration award, and one dated September 24, 1998 dismissing the defamation case.

On October 12, 1998, Campbell filed a motion to vacate the Court's decision purportedly pursuant to Fed. R. Civ. P. 59.[1] (App. 1c) The grounds for the motion were that: (1) the District Court committed "manifest errors" of fact and law in reaching its earlier decision; and (2) the judgment had to be altered to prevent "manifest injustice"

---

[1] Because Campbell's "Rule 59" motion was filed untimely, the Court of Appeals recognized in its Order of October 5, 1999 that it was a motion pursuant to Fed. R. Civ. P. 60.

to Campbell. In her motion for reconsideration, Campbell reargued the merits of her original petition to vacate the arbitration award contending that the District Court erroneously disregarded Campbell's compelling evidence the first time around. She argued that the Court failed to consider the overwhelming credibility and volume of her evidence of defamation. She further argued that the Court erred in treating her claim solely as a wrongful termination claim, when, in fact, the petition to vacate was predicated entirely upon her defamation claim which she contended the Court failed to consider. Campbell finally argued that the District Court erred in failing to undertake a de novo review of the entire NASD record. (App. 1c-7c) At the time of Campbell's motion to vacate, she still had not submitted the NASD transcripts to the Court, nor any other evidence beyond what was before the Court when it decided not to vacate the arbitration award.

On October 20, 1998, the District Court issued a memorandum decision denying the motion to vacate. (App. 1c-7c) The Court clarified that in affirming the arbitration award it had indeed considered the merits of Campbell's defamation claim as well as her employment claim. The Court also found that Campbell had the opportunity to present the NASD transcripts in accordance with its directive at the July 1998 conference between the parties, but that she had failed to do so. The Court also explained that even if Campbell had submitted the transcripts, the result would have been the same. First, the Court had held that Campbell's summary of the evidence in her brief and supporting papers would not justify vacating the award. Because it had already considered the matter in the light Campbell herself had cast on it, which was

presumably favorable to her case, the transcript would not have improved her position. Second, all of her arguments focused on the weight and credibility of the evidence, which the Court could not re-examine in light of the narrow scope of its review of the arbitration award and that she failed to articulate a principal that had been manifestly disregarded. At no time during the proceedings before the District Court did Campbell submit the NASD transcripts. (App. 1c-7c)

On November 16, 1998, Campbell appealed the District Court's denial of reconsideration to the United States Court of Appeals for the Second Circuit. Campbell's notice of appeal said that it was an appeal "from the Memorandum Decision entered October 22, 1998, denying Petitioner's F.R.Civ.P. Rule 59 motion to vacate the judgment of this court entered September 29, 1998 denying Petitioner's Motion to Vacate an arbitration award in 98 Civ. 3973 and dismissing the petition filed in *Campbell v. Cantor Fitzgerald et al.*, No. 98 Civ. 4547 (DC)." (APP 1)

When the notice of appeal was filed, Campbell had not yet obtained the NASD transcripts. Campbell moved, first in the District Court, and then in the Court of Appeals, to correct the record to include the transcripts of the NASD proceedings not adduced below.

The Court of Appeals entered a scheduling order on December 21, 1998. On January 29, 1999 and February 22, 1999, Campbell moved for an enlargement of the time for filing briefs in order to permit her to subpoena the NASD transcripts, which she still had not done. Campbell then made a third and fourth motion to extend time to obtain the NASD transcripts. She filed her appeal brief out

of time after the last motion was denied. Excerpts from the NASD transcripts were finally produced in the "Joint" Appendix filed with her brief for the first time, without Cantor's consent or the Court's permission.

Campbell's brief to the Court of Appeals argued that the District Court erred in its original underlying judgments confirming the arbitration award and dismissing Campbell's defamation claim. Cantor's appellee brief responded to these issues. The briefs did not address whether the District Court's later decision denying reconsideration was correct, but addressed the merits of the underlying judgments as framed by Campbell's principal brief.

Counsel was advised by the Court of Appeals' staff that the caption of Cantor's brief was incorrect. As that caption was taken from Campbell's brief, the Court notified Campbell of the deficiency as well. It reflected that two cases were on appeal, namely, the arbitration confirmation action and the defamation action. Campbell moved to amend the caption to include the defamation action. This led counsel for Cantor to examine the Notice of Appeal more closely. Based on that examination, in response to the motion to amend the caption, Cantor filed a motion to dismiss as untimely Campbell's appeal from the dismissal of her defamation action on the ground that the court lacked jurisdiction.

On October 5, 1999, a motions panel of the Court of Appeals issued an order denying the motion to dismiss. The Court held, however, based on the notice of appeal's language that "Campbell's appeals are limited to the order denying reconsideration as specified in the notice of appeal;

she cannot appeal the underlying judgment in either case." Supplemental briefing on the District Court order denying reconsideration was allowed. Campbell then sought reconsideration of the motions panel order, which was denied. (App. 2b)

After oral argument, a merits panel of the Court of Appeals issued a summary order on December 23, 1999. It affirmed the District Court's denial of Campbell's reconsideration motion. The Court reached that result for three reasons. (App. 2b-5b)

First, the Court found that despite having had ample opportunity to do so, Campbell failed to proffer to the District Court the NASD transcripts. She could not, therefore, complaint that the District Court failed to consider the transcripts. (App 3b)

Second, the Court held that even if Campbell had submitted the transcripts with her reconsideration motion, the District Court could have properly disregarded them since that evidence was available to Campbell throughout the District Court proceedings and was not, therefore, newly discovered. (App. 4b)

Third, the Court reasoned that even if Campbell had properly entered the transcripts, there was nonetheless a reasonable basis for the District Court to conclude that the arbitration award was not in manifest disregard of the law. The Court of Appeals reached this conclusion because all of Campbell's arguments in the District Court related to the credibility of the witnesses and the weight of the evidence which the District Court could not properly reconsider.

Indeed, the Court of Appeals found that Campbell failed to "identify a single legal principle or standard that the district court overlooked." (App. 4b) Campbell then sought rehearing en banc by the Court of Appeals, which was denied. (App. 1a)

Campbell now petitions this Court for a writ of certiorari. Because this case involves only the consequences of Campbell's failure adequately to create a record, Campbell's petition should be denied.

SUMMARY OF THE ARGUMENT

Campbell's own failures below do not entitle her to a writ of certiorari. Campbell seeks certiorari based on her failure to designate in her notice of appeal the judgments she wished to appeal, her failure to proffer the NASD transcripts to the District Court, and ultimately her failure adequately to identify to the arbitrators or either court below any principle of law allegedly "manifestly disregarded." She now claims that both the District Court and Court of Appeals did not fully consider the matter. Campbell's failure to make an adequate record below or properly perfect her appeal is not grounds for obtaining a writ of certiorari.

First, the Court of Appeals properly restricted the scope of its review of Campbell's appeal to the judgment set forth in the notice of appeal. The notice of appeal said that it was an appeal from a denial of a motion for reconsideration before the District Court. This is precisely what the Court of Appeals reviewed. Campbell did not include in her notice of appeal the underlying judgments entered by the District Court, and so she cannot now complain that the Court of Appeals erroneously failed to review those judgments, and impermissibly limited the scope of its review.

Further, Campbell never submitted the record of the NASD proceedings to the District Court which she now contends warranted reversal by the Court of Appeals. Campbell had ample opportunity during the time in which this matter was pending to obtain the transcripts, and present them to the District Court below but she failed to do

so even after an explicit directive by the District Judge. She did not create a record of a tender or proffer. Campbell similarly cannot complain that the District Court failed to consider that which she never submitted, and that she was denied a full hearing by the Court of Appeals on that same ground.

In any event, even assuming the manifest disregard standard for appeal of arbitral awards is the appropriate one to be applied, as both the District Court and Court of Appeals correctly found, Campbell failed to present to either Court any clearly defined principle of law that the arbitrators allegedly ignored. As such, both of her appeals were properly denied on their merits.

Campbell simply has failed to set forth any reason to warrant the grant of a writ of certiorari. All of the failings that she now claims are error were her own. This case does not present any matter of public importance warranting this Court's consideration, and indeed, is so fact-intensive that it would mire this Court in a virtual de novo review of the record. Thus, no writ should issue and Campbell's petition should be denied.

ARGUMENT

POINT I

CAMPBELL'S FAILURE TO INCLUDE IN HER NOTICE OF APPEAL THE UNDERLYING JUDGMENTS OF THE DISTRICT COURT DOES NOT ENTITLE HER TO A WRIT OF CERTIORARI NOR CAN IT FORM THE BASIS OF ERROR BY THE COURT OF APPEALS

The Court of Appeals correctly confined the scope of its review to the District Court's Order denying reconsideration, which was the only order specified in Campbell's notice of appeal. There is no merit to Campbell's argument that the Court of Appeals impermissibly limited the scope of its review. The Court of Appeals reviewed precisely the judgment that Campbell specified in her notice of appeal.

This case involved three separate judgments by the District Court, namely: (1) a judgment dated September 29, 1988 denying Campbell's petition to vacate the arbitration award; (2) a judgment dated September 24, 1988 dismissing Campbell's separate defamation action; and (3) an order dated October 22, 1998 denying Campbell's motion for reconsideration. The only judgment specified in the notice of appeal was the reconsideration order.

Campbell's notice of appeal read as follows:

> Notice is hereby given that Mary Therese Campbell, through her undersigned attorneys, hereby appeals to the United States Court of Appeals for the Second Circuit from the Memorandum Decision entered October 22, 1998, denying Petitioner's F.R.Civ.P. Rule 59 motion to vacate the judgment of this court entered September 29, 1998 denying Petitioner's Motion to Vacate an arbitration award in 98 Civ. 3973 and dismissing the petition filed in *Campbell v. Cantor Fitzgerald et al.*, No. 98 Civ. 4547 (DC).

(APP 1)

Although Campbell may have wanted to appeal the underlying judgments of the District Court confirming the arbitration award in Cantor's favor and dismissing her separate related defamation claim, those judgments were not included in Campbell's notice of appeal. No timely motion was made to the District Court to amend the notice of appeal. Consequently, those judgments were not the proper subject of the appeal, and the Court of Appeals correctly limited its review to the reconsideration order of the District Court as specified in the notice of appeal.

A. The Underlying Judgments Were Not Included In The Notice Of Appeal And So Review On Appeal Was Correctly Restricted To The District Court's Reconsideration Order

If, as Campbell contends, she wished to appeal all three of the decisions of the District Court, she should have included those decisions in the notice of appeal. To bring up each of the judgments for review, the notice of appeal would have had to read somewhat as follows:

> Campbell appeals 'from the Memorandum Decision entered October 22, 1998, denying Petitioner's F.R.Civ.P. (sic) Rule 59 motion to vacate the judgment of this court entered September 29, 1998, **and from the judgment** denying Petitioner's Motion to Vacate an arbitration award in 98 Civ. 3973 **and from the judgment** dismissing the petition filed in *Campbell v. Cantor Fitzgerald et al.*, No. 98 Civ. 4547 (DC).'

This is not what Campbell's notice of appeal said. In the October 5, 1999 order, the Court of Appeals correctly observed that the only order on appeal was, as specified in the notice of appeal, the District Court's denial of reconsideration. The motions panel and the merits panel of the Court of Appeals both read what was written in the notice of appeal, and confined the scope of review accordingly.

Fed. R. App. P. 3(c) requires that an appellant specify in the notice of appeal the order or decision for which review is sought. The Rule provides in part that: "The notice of appeal must . . . designate the judgment, order or part thereof being appealed." Under Fed. R. App. P. 3(c), only the judgments or orders specified in a notice of appeal may properly be considered by the court. Kowsh

v. Board of Elections of the City of New York, 99 F.3d 78, 80 (2d Cir. 1996)(holding that only judgment denying injunction was properly before the court as other decisions of district court were not specified in the notice of appeal); see also Terkildsen v. Waters, 481 F.2d 201, 206 (2d Cir. 1973)(holding that parts of judgment not specified in notice of appeal may not be considered by court).

Furthermore, where two or more judgments are distinct, designation of one in the notice of appeal leads to the inference that no appeal is sought with respect to the undesignated judgments. As observed in Terkildsen:

> if the parts [of the judgment] are truly independent, the more likely inference from the designation of particular parts in the notice of appeal is that appellant does not desire review of the parts not designated.

Terkildsen, 481 F.2d at 206 (quoting 9 Moore's Federal Practice ¶ 203.18 at 756.)

Here there is no question that each of the three judgments of the District Court were totally distinct and independent. Nor was there any question that Campbell did not specify in her notice of appeal that she was appealing the judgment confirming the arbitration award or the judgment dismissing her defamation claim. The notice of appeal indicated that the only order being appealed was that which denied her motion for reconsideration. To read the notice of appeal any other way would have effected a drastic change in the scope of the appeal. Because Campbell failed to include the underlying judgments in her

notice of appeal, those judgments were not properly the subject of the appeal, and the two panels (motions and merits) of the Court of Appeals were correct in restricting review to the reconsideration order.

B. Campbell's Failure To Move Before The District Court To Amend Her Notice Of Appeal Similarly Precluded The Court Of Appeals From Reviewing The Underlying Judgments

Campbell never moved to amend her notice of appeal to include the two additional judgments that she claims the Court of Appeals incorrectly failed to consider. Fed. R. App. P. 4(a)(4)(B)(ii) contemplates the filing of amended notices of appeal. However, an amendment to the notice of appeal to include other judgments is only permitted where a party seeks additionally to appeal a decision on a post-judgment tolling motion. That was not the situation presented here. In this case, Campbell sought in the Court of Appeals to include the two original judgments of the District Court having failed to do so initially. This could only have been accomplished by timely motion in the District Court pursuant to Fed. R. App. P. 4(a)(5)(A) or 4(a)(6).

Fed. R. App. P. 4(a)(5)(A) and 4(a)(6) provide the exclusive method by which a party may file a late notice of appeal or alter or amend the notice to include judgments other than post-judgment orders. Under Rule 4(a)(5)(A), the District Court may extend for a period of 30 additional days, the time to file a notice of appeal provided the party seeking the extension moves within 30 days of entry of the

judgment and the court finds excusable neglect or good cause. Under Rule 4(a)(6), the District Court may reopen the time for appeal but only if: (1) the motion to reopen is made within 180 days of entry of the judgment or 7 days of notice of entry, whichever is earlier; (2) the District Court finds that the moving party did not receive notice of entry within 21 days of entry of the judgment or order; and (3) no party would be prejudiced.

Campbell never moved in the District Court either to file a late notice or to reopen the time for appeal to include in her notice the District Court's original judgments and these are the only means by which Campbell could have brought up those judgments for review. Having failed to specify these judgments in her original notice of appeal, and thereafter having failed to move in the District Court for leave to do so, Campbell was precluded from appealing those judgments to the Court of Appeals.

Finally, that the parties briefed the merits of the two underlying judgments was insufficient both as a matter of law and fact to expand the scope of the appeal. The briefs cannot expand the scope of an appeal which is determined by reference to the notice of appeal alone. See Kowsh, 99 F.3d at 80 (declining to address two of the three arguments contained in appellant's brief on the ground that only the first of those arguments was properly before the court based on the issues as specified in the notice of appeal).

The apparent expansion of the issues on the appeal was precipitated by Campbell's brief which was not appropriately limited to the reconsideration order notwithstanding the notice of appeal. Cantor responded to

the arguments raised by Campbell's principal brief and was not led to re-examine the notice of appeal until after an issue arose over the caption. Cantor did not, as Campbell suggested below, knowingly acquiesce in her attempt to expand the appeal, and indeed, objected to it. The content of the parties' briefs did not enlarge the scope of the appeal to include two judgments which were not specified in the notice of appeal. Thus, the Court of Appeals correctly limited its review, consistent with the notice of appeal, to the District Court's order denying reconsideration.

POINT II

CAMPBELL'S FAILURE TO PROFFER THE NASD TRANSCRIPTS TO THE DISTRICT COURT DOES NOT ENTITLE HER TO A WRIT OF CERTIORARI UNDER RULE 10 AND CANNOT BE THE BASIS FOR ANY ERROR BY THE COURT OF APPEALS

Campbell never presented the NASD transcripts to the District Court despite having had ample opportunity to do so. She did not submit the transcripts to the Court of Appeals until after she had requested and obtained four extensions of time for filing her appeal brief. Clearly, Campbell cannot now claim that the Court of Appeals should have reversed the judgment of the District Court because of its failure to review a record that was never submitted to it.

Indeed, Campbell did not even obtain the record or make any effort to submit it until her appeal to the Court of Appeals. Campbell could have procured the NASD record at any time during the years in which this matter was pending. She could have obtained it after the arbitration proceeding, but she did not. She could have obtained it before filing her petition to vacate the award, but she did not. She could have obtained it during the pendency of that petition, or the later motion to vacate, but she did not.

Obtaining the record would have been a fairly simple matter. NASD Rule 10326 provides a right to a transcript:

> A verbatim record by stenographic reporter or a tape recording of all arbitration hearings shall be kept. If a party or parties to a dispute elect to have the record transcribed, the cost of such transcription shall be borne by the party or parties making the request unless the arbitrators direct otherwise. The arbitrators may also direct that the record be transcribed. If the record is transcribed at the request of any party, a copy shall be provided to the arbitrators.

Thus, Campbell could simply have requested a copy of the transcripts from the NASD at any time, and submitted them to the District Court for its consideration.

Campbell has argued, however, that she was somehow precluded by the District Court from submitting the record. Even if this were true (although the District Court held otherwise), Campbell had a duty, if she wished to preserve the Court's refusal to review the transcripts as error, at least to attempt to tender them even over the Court's purported objection. At the very least, Campbell should have made a proffer as to what the record contained. Campbell did nothing to preserve the record on this issue, and indeed, could not do so, as her motions to extend time in the Court of Appeals reveal that she never obtained the transcripts herself during the District Court proceedings.

The contention that the District Court refused to permit Campbell to submit the transcripts is squarely contradicted by the record. In June 1998, the District

Court held a conference, and directed Campbell to submit whatever materials she wished by a date certain. As the District Court explained:

> . . .as my notes of the conference confirm – I instructed "[petitioner] to submit m/l [memorandum of law] and anything else that she wants to be part of the record by 7/13/98." Accordingly, I directed petitioner to submit a memorandum of law and "anything else" that she wanted to be part of the record by July 13, 1998, and petitioner could have submitted the transcripts and any exhibits then.

(App. 3c)

Notwithstanding this explicit directive, Campbell failed to obtain and submit the transcripts. Indeed, Campbell did not even procure the transcripts until after requesting four extensions of time for the filing of briefs in the Court of Appeals.

Having failed to tender evidence to the District Court, Campbell cannot claim that the Court's failure to consider that evidence is reversible error and that the Court of Appeals should have reversed on that ground. On the contrary, Campbell's failure to present the transcript alone provided sufficient grounds for the District Court to affirm the award. See Commonwealth Associates v. Lestos, 40 F. Supp.2d 170 (S.D.N.Y 1999)(holding that "the lack of a complete record alone is sufficient to require [confirmation of arbitration award]" because the absence of a full record

"leaves the Court unable to exclude the possibility that the award is supported by evidence that [the party seeking to vacate the award] has not placed before it."). See also Malek v. Federal Insurance Co., 994 F.2d 49 (2d Cir. 1993)(observing that offer of proof as to content of evidence is required to preserve issues on appeal); United States v. Curcio, 759 F.2d 237 (2d Cir. 1985)(finding that failure to proffer evidence constitutes waiver of issue on appeal).

As the District Court noted, it "denied the motion only after carefully considering the arguments advanced by [Campbell] including her representations as to the evidence produced during the arbitration proceedings." (App. 3c). Thus, having accepted Campbell's characterization in her brief and elsewhere of the evidence, omission of the transcripts was harmless.

In the proceedings below, Campbell did not articulate any statute or well developed principle of the common law which she could show was presented to the arbitrators, clearly governed the result, and was demonstrably ignored. Campbell simply failed to meet the "manifest disregard" standard she sought to invoke even assuming its validity and applicability here. Consequently, her appeals were properly denied on their merits.

Campbell argued, as she continues to argue now, that the evidence in the NASD record overwhelmingly supported her claims. She contended that the demonstrable incredibility of witnesses and overall weight of the evidence proved her claims of defamation and wrongful termination. This, however, was not sufficient to make even the

threshold showing of manifest disregard, and surely was not sufficient to require the District Court to delve into 2,200 pages of testimony to re-examine Campbell's claims. As the District Court correctly held:

> Even though the arbitrators did not explain the reasoning behind their decision, I am not persuaded that the applicable law in this case was ignored. Indeed, Campbell never identifies any principle of law that the panel purportedly failed to follow. Rather her approach is a factual one that focuses on the credibility of the evidence presented, which is not a proper basis upon which to vacate the award at issue.

(App. 9d-10d)

Even if the claims in the arbitration proceeding, i.e., defamation and wrongful termination, themselves constituted the governing law which was purportedly ignored by the arbitrators, Campbell's arguments still fail. First, each and every case involving the discharge of an employee in the securities industry potentially implicates claims of defamation since the Form U-5 is a required filing whenever a securities employee is terminated. Thus, the termination of every securities employee would potentially constitute defamation, and would require, following arbitration, a de novo review of the record to determine whether the law of defamation was ignored by the arbitrators.

Second, if the well defined applicable law was the law of retaliatory termination, that too must fail. It is well settled that New York does not recognize a cause of action for wrongful discharge of at-will employees purportedly in violation of public policy which Campbell advanced at the arbitration. See Murphy v. American Home Products Corporation, 58 N.Y.2d 293, 461 N.Y.S.2d 232 (N.Y. 1983)(declining to create a cause of action for wrongful discharge). See also Weider v. Skala, 80 N.Y.2d 628, 593 N.Y.S.2d 752 (N.Y. 1992)(noting that New York law does not recognize claims for retaliatory termination). Having rejected a cause of action for retaliatory termination of employees who engage in allegedly protected activities, surely the New York courts would not recognize a cause of action for retaliatory termination of an employee arising from his or her spouse's activities. But that was precisely the claim posited by Campbell at the arbitration. Thus, there is no principle of law protecting an employee from termination where the alleged retaliation is based on the activities of a spouse. Consequently, the arbitrators specifically found that:

> As to the claim of wrongful termination and all other claims sounding in wrongful termination, the Panel finds that as a matter of law and fact that the Claimant was an at will employee and as such may be terminated for any or no cause. The panel further finds that the termination of the Claimant did not fall within any of the exceptions recognized under law for imposing liability upon the employer in the event of the termination of an at will employee.

(App. 4b)

Given the state of the law in New York, Campbell could not and indeed did not identify any specific, clearly defined, governing principle of law of sufficient public policy significance that the arbitrators purportedly disregarded. Campbell failed to make this threshold showing in the District Court or the Court of Appeals to sustain her claim of manifest disregard.

Throughout, Campbell misapprehended the limited nature of the scope of arbitration review. Campbell continues to urge that a searching factual review of the NASD record was required. This re-weighing of the evidence and credibility is precisely what the District Court could not, and properly did not, do. The Court of Appeals correctly agreed when it held that:

> . . . even if Campbell had properly entered the transcripts, there was a reasonable basis for the District Court to conclude the arbitration panel's conclusions were not in manifest disregard of the law. The district court properly deferred to the arbitration panel's factual determinations. Campbell fails to identify a single legal principle or standard that the district court overlooked. Campbell's motion merely attempted to re-try her case.

Thus, neither the District Court nor the Court of Appeals improperly restricted the scope of its review of

Campbell's appeals. Before the arbitrators, the District Court and the Court of Appeals, Campbell never identified a principle of law allegedly "manifestly disregarded."

CONCLUSION

Because this case presents no issue of general public importance, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Michael A. Lampert
SAUL EWING LLP
A Delaware LLP
Attorneys for Respondents
214 Carnegie Center, Suite 202
Princeton, NJ 08540
(609) 452-3100

APPENDIX - NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARY TERESE CAMBPELL,	:	
	:	Docket Nos.
Petitioner,		98 Civ. 3973 (DC)
v.	:	98 Civ. 4547 (DC)
CANTOR FITZGERALD & CO., HOWARD LUTNICK, Jointly and severally and HARRY NEEDLEMAN, Jointly and severally,	:	NOTICE OF APPEAL
Respondents.	:	

Notice is hereby given that MARY TERESE CAMPBELL, through her undersigned attorneys, hereby appeals to the United States Court of Appeals for the Second Circuit from the Memorandum Decision entered October 22, 1998, denying Petitioner's F.R.Civ.P. Rule 59 motion to vacate the judgment of this court entered September 29, 1998 denying Petitioner's Motion to Vacate an arbitration award in 98 Civ. 3973 and dismissing the petition filed in *Campbell v. Cantor Fitzgerald et al.*, No. 98 Civ. 4547 (DC).

by s/Patrick J. Murphy PM 9229

Patrick J. Murphy
MURPHY & O'CONNELL
Attorneys for Petitioner
14 Wall Street, 22nd Fl.
New York, NY 1005-2101
(212) 619-0450

Dated: New York, New York
November 16, 1998

To: Wilson, Elsner *et al.*
150 E. 52nd Street
New York, NY 10017
(212) 490-3000